No. 86-218

Supreme Court, U.S.
FILED
AUG 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1986

DALE WALKER, SHARON PATCHETT, DANNY DILL, THE ESTATE OF WILLIAM THOMAS, THE ESTATE OF STANLEY COLE, and THE ESTATE OF ROBERT CONKLE,

Petitioners,

v.

CHARLES ROWE and DAVID SANDAHL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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57 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the deliberate indifference of Respondents to a developing prison riot renders them liable under 42 U.S.C. §1983 to Petitioners who suffered injury and death during the riot?

II. Whether state-provided post-deprivation remedies bar a suit brought under 42 U.S.C. §1983 by prison guards against a Director of Corrections and an Assistant Warden?

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No.

DALE WALKER, SHARON PATCHETT, DANNY DILL, THE ESTATE OF WILLIAM THOMAS, THE ESTATE OF STANLEY COLE, and THE ESTATE OF ROBERT CONKLE,

Petitioners,

v.

CHARLES ROWE and DAVID SANDAHL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Dale Walker, Sharon Patchett, Danny Dill, The Estate of William Thomas, The Estate of Stanley Cole, and The Estate of Robert Conkle respectfully petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review that court's judgment of May 19, 1986 in *Walker* v. *Rowe,* No. 85-2057 (7th Cir. May 19, 1986).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not officially reported at this time. The unofficial citation is *Walker* v. *Rowe,* No. 85-2057 (7th Cir. May 19, 1986). A copy of the opinion is included with this Petition as Appendix A.

The opinion of the United States District Court for the Northern District of Illinois is not officially reported at this time. The unofficial citation is *Walker* v. *Rowe,* No. 80 C 5310 (N.D. Ill. May 20, 1985). A copy of the opinion is included with this Petition as Appendix B.

The opinion of the United States District Court for the Northern District of Illinois on the respondents' motion to dismiss is reported at *Walker* v. *Rowe,* 535 F.Supp. 55 (N.D. Ill. 1982). A copy of the opinion is included with this Petition as Appendix C.

JURISDICTION

The date of judgment of the Court of Appeals was May 19, 1986. Judgment was entered on the same date. This Court has jurisdiction under 28 U.S.C. §1254.

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMENDMENT XIV, §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The petitioners or their decedents were guards who were injured or killed during a prison riot at the Pontiac Correctional Center, Pontiac, Illinois, on July 22, 1978. The Pontiac Correctional Center is a maximum security facility housing the most dangerous adult male inmates in the state correctional system.

The respondents are Charles Rowe, Director of the Illinois Department of Corrections at the time of the riot, and David Sandahl, then Assistant Warden of Operations having responsibility for security at the institution.

Having pursued various remedies available to them under Illinois law, the petitioners obtained jurisdiction in the instant cause of action under 42 U.S.C. §1983 alleging 1) that a plethora of institutional and operational deficiencies at Pontiac led and contributed to their injuries or deaths, and 2) that the failure of the respondents to act to correct such deficiencies amounted to an unconstitutional deprivation of life and liberty without due process of law.

During the course of the trial in federal district court, the jury heard considerable evidence, often disputed by the respondents, about the problems plaguing Pontiac prison. These problems included inadequate personnel training, overcrowding, inadequate and broken equipment, understaffing, acute staff absenteeism, poor communications procedures among staff, official ignorance of or indifference to forewarnings of the riot, official ignorance of the production and movement of weapons among the prisoners, areas in the prison which were outside visual or radio contact, gang activity, the absence of the warden, the assistant wardens, and the duty warden from the prison at the time the riot broke out, and inadequate response to the riot by managerial personnel when they finally made their appearance.

The trial court denied the respondents' motion to dismiss (Appendix C). The jury was instructed that in order to find that one of the defendants deprived one of the plaintiffs his or her life or liberty without due process of law, it must find that the defendant acted or failed to act either knowing that his act or omission would endanger the plaintiff, or with deliberate or reckless indifference to that plaintiff's safety. The jury, aware of the compensation due the petitioners by virtue of their state law remedies, awarded verdicts in favor of the petitioners totaling $706,845. The trial court subsequently denied the respondents' motion for judgment N.O.V. and awarded petitioners' counsel fees and costs of $145,792.50 under 42 U.S.C. §1988 (Appendix B).

The Court of Appeals reversed the judgments (Appendix A). Their opinion is discussed below.

REASONS FOR GRANTING THE WRIT

I. WHETHER THE DELIBERATE INDIFFERENCE OF RESPONDENTS TO A DEVELOPING PRISON RIOT RENDERS THEM LIABLE UNDER 42 U.S.C. §1983 TO PETITIONERS WHO SUFFERED INJURY AND DEATH DURING THE RIOT?

Actions arising under 42 U.S.C. §1983 are a species of tort, *Imbler* v. *Pachtman*, 424 U.S. 409, 417, 96 S.Ct. 984, 988, 47 L.Ed.2d 128, 136 (1976). While the statute is not intended to supplant state tort law, the similarities between tort analysis and §1983 analysis are sufficiently close for Justice Stevens to state, "The atrocities that concerned Congress in 1871 plainly sounded in tort. Relying on this premise we have found tort analogies compelling in establishing the elements of a cause of action under §1983." *Wilson* v. *Garcia*, 471 U.S. ....., 107 S.Ct. ....., 85 L.Ed.2d 254, 267 (1985). Accordingly, the lower courts have subjected this §1983 action to analysis in terms of the traditional tort concepts of duty and proximate cause. For the jury, the respondents' duty, stated negatively, was to not act with deliberate or reckless indifference to the petitioners' safety. The jury found for the petitioners, and the trial court subsequently held that the verdict was consistent with the evidence. App. B. When the Seventh Circuit analyzed this case, however, it concluded that the respondents owed no duty to the petitioners, but it did so against a backdrop of conflicting precedents.

The idea that the state has an affirmative duty to protect others in certain circumstances can be traced to at least two sources: *Estelle* v. *Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), and *Martinez* v. *California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980). *Estelle*

concerned the failure of prison officials to provide medical care to an inmate. There, the Supreme Court held that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' [citation omitted] proscribed by the Eighth Amendment," 429 U.S. at 104, and that the government had an "obligation to provide medical care for those whom it is punishing by incarceration," *Id.* at 103. In *Martinez,* the victim of state inaction was not in custody but was a private citizen murdered by a parolee five months after he was released. While the Court did not deal directly with the issue of whether the state had a duty to protect the victim, *Martinez* permits the inference of two criteria which federal courts occasionally apply to determine whether there is a "special relationship" between the state and the victim which would invoke a constitutional duty to protect. The first is whether the state was aware that the victim, as distinguished from the public at large, faced any special danger, and the second is how closely the danger to the victim is linked to the acts of the state, 444 U.S. at 285. An examination of how federal courts have applied or departed from these concepts reveals the conceptual thicket which has grown since *Estelle* and *Martinez* were decided.

In the Seventh Circuit, the Court of Appeals first faced the issue of an affirmative duty to protect in *Bowers* v. *DeVito,* 686 F.2d 616 (7th Cir. 1982), confronting facts much like those in *Martinez*: a state mental hospital released a patient who murdered a woman. The Court introduced a new criterion for determining when a constitutional duty to protect arises, and did so by melding the Eighth and Fourteenth Amendments to conclude that

the state need take action to protect only those whom it has put in a position of danger, *Id.* at 618.

The following year, the Court of Appeals in the Fourth Circuit dealt with the same issue in a case brought by victims of a set of vicious assaults committed by a man who remained on parole despite his parole officers' knowledge and suspicion of other criminal acts committed since his release. The Court in *Fox* v. *Custis,* 712 F.2d 84 (4th Cir. 1983), cited *Bowers* approvingly but ultimately applied *Martinez,* finding the injuries complained of "too remote" from the conduct of state actors to be actionable under §1983, and determining that the defendants were unaware that the claimants faced any special danger, 712 F.2d at 87, 88.

While *Martinez* never used the term "special relationship" to connote those not in custody which the state had a duty to protect, *Fox* did, and the term came into frequent use. The Tenth and Eleventh Circuits undertook an examination, in *Humann* v. *Wilson,* 696 F.2d 783 (10th Cir. 1983) and *Wright* v. *City of Ozark,* 715 F.2d 1513 (11th Cir. 1983), not just of the relationship between the victim and the state, but between the victim and the criminal as well, apparently to determine whether state officials should have inferred any special danger to the victims as distinguished from the public at large. Such an analysis is implied by *Martinez,* since the state's knowledge of the relationship between the victim and the criminal is an obvious factor in whether the state is aware of any special danger faced by the victim as distinguished from the public at large. An inquiry into the victim's relationships to the state and the criminal was also undertaken in *P.L.C.* v. *Housing Authority of the County of Warren,* 588 F.Supp. 961 (1984). This case arose from

the rape of a resident of public housing by an employee of the Housing Authority. Two of the factors which the court said were critical of its determination of the victim's special relationship with the Authority were that citizens would actively seek out public housing provided by the Authority, and that the Authority controlled the premises involved, including the provision of security equipment, *Id.* at 965.

What is notable about *P.L.C.* is that the analysis, inferable from *Martinez*, employed factors which, if considered by the Seventh Circuit in the present case, were used here to disqualify the petitioners from recovery under §1983. The voluntary acceptance of habitation in *P.L.C.* is clearly analogous to the voluntary acceptance of employment cited by the Seventh Circuit as a disqualifying factor. Would-be residents in *P.L.C.* presumably had to decide whether to take an apartment with a given mix of rent and security, as the guards here accepted employment with a given mix of pay and security. The court in *P.L.C.* apparently held, however, that the fact the victim had accepted the mix offered by the Authority does not mean that she accepted deprivations of life and liberty interest due to the reckless indifference of officials. Obviously, widely divergent criteria are being used by the federal courts for deciding the same issue on analogous facts.

While the Fourth Circuit in *Fox* followed *Martinez* closely, a year later that court took a much different approach in *Jensen* v. *Conrad*, 747 F.2d 185 (4th Cir. 1984). *Jensen* never reached a resolution of the affirmative duty issue, relying for its holding on other grounds. It does specify three factors, however, "that should be included in a 'special relationship' analysis," 747 F.2d at 194, n. 11.

These are 1) whether the victim or perpetrator was in legal custody at the time of or prior to the incident; 2) whether the state has expressly stated its desire to provide affirmative protection to a particular class or specific individuals; and 3) whether the state knew of the claimants' plight, *Id.*

Note that of the three criteria, only the third survives from *Martinez.* Note, too, that had the Seventh Circuit applied these criteria instead of its own to the present case, a special relationship would have been established. First, the perpetrators (the prisoners) were in custody at the time of the incident. Second, the state had expressed the desire to protect prison guards. See 38 Ill. Stat. ¶1003-7-4 (directing the Department of Corrections to establish rules and regulations for the protection of employees and inmates); 48 Ill. Stat. ¶137.3, §3(a) (imposing the duty on every employer under the Act to provide reasonable protection to the lives, health and safety of employees and to furnish employment and a place of employment which are free from recognized hazards that are likely to cause death or serious physical harm to employees). See also 38 Ill. Stat. ¶1003-6-4 (authorizing guards to use whatever suitable means necessary to defend themselves). Third, the state knew of the potential for more than the usual amount of violence. This criterion raises a fact question which is affirmatively resolved by the record.

Last year, the Seventh Circuit decided a case regarding the state's duty to protect which stands in marked contrast to the present case. *Ellsworth* v. *City of Racine,* 774 F.2d 182 (7th Cir. 1985), concerned the wife of a threatened policeman who alleged that the City had failed to

protect her adequately. The Court of Appeals found no constitutional duty on the City to protect her, though it did discern the presence of an undefined "limited special relationship" between the City and the family, *Id.* at 186. The Court also left open the possibility, arguably foreclosed by the present case, that "there may be situations when a municipal employee and the municipality have, by virtue of the employment relationship a special relationship for purposes of §1983. In that case, the municipality would have a constitutional duty to provide elementary protective services to the employee," *Id.* In a concurrence, Judge Coffey noted "the due process clause of the Fourteenth Amendment encompasses a right to be free from 'unjustified intrusions on personal security,'" citing *Ingraham* v. *Wright,* 430 U.S. 651, 673, 97 S.Ct. 1401, 1413, 51 L.Ed.2d 711 (1976). *Id.* at 187. Judge Coffey, applying *Martinez,* concluded that there was a special relationship, though no liability because the plaintiff was unguarded at the time of the attack due to her own statement that a guard need not stay with her. What is remarkable when one compares *Ellsworth* to the present case is that two panels of the same circuit, one year apart, both with the same precedential background, employ such divergent analyses on the same issue.

With this last case, we reach 1986 and see that there is still little agreement among the circuits about the principles which are to govern this area of federal law. *McClary* v. *O'Hare,* 786 F.2d 83 (2d Cir. 1986), involves a state highway employee killed by faulty equipment operated by uncertified personnel. The Court's criterion for whether there was a duty on the state to protect is whether the victim was in the state's custody or control, *Id.* at 88. This is not a standard derived from *Martinez,*

but it would permit recovery if applied to the petitioners here. Yet the Court veers from this standard to one far more stringent when it summarizes its holding by stating that reckless acts of government employers do not give rise to substantive due process violations unless the challenged conduct is "uniquely governmental in character," *Id.* at 89, n. 6.

It is obvious from this examination of cases that the law regarding a state's affirmative duty to protect others is in considerable disarray, and that standards are evolving without any discernable constitutional moorings. Compounding the problem of a lack of uniformity is an important federal question arising out of the present case as well as from *McClary*. That question is, simply put, who shall have access to the §1983 remedy?

The statute itself would seemingly make an answer to this question a simple matter: recovery may be had by "any citizen of the United States or other person within the jurisdiction thereof." 42 U.S.C. §1983. Nevertheless, varying applications of the tort concepts of duty and of proximate cause by the circuits have led to the practical and economic result that entire groups of people are effectively excluded from §1983 recovery. In the present case, the Seventh Circuit makes it clear that prison guards may not recover from the respondents under §1983 for official negligence, deliberate indifference, or even gross negligence. App. A, 5. The Court of Appeals further suggests that, since the guards assumed their jobs voluntarily and the state has not placed them in danger, the state owes them no duty. Thus, in the Seventh Circuit, prison officials have an effective absolute immunity from §1983 suits brought by prison guards.

In addition, the Seventh Circuit's exclusion of state prison guards from access to §1983 remedies, public employees have been likewise excluded in the Second Circuit in *McClary,* unless the challenged conduct is "uniquely governmental in character," 786 F.2d at 89, n. 6. Even intentional deprivations of life and liberty are not actionable by public employees if private employers could conceivably be guilty of the challenged conduct.

The Seventh Circuit also dealt with the issue of proximate cause, stating "the defendants did not kill or injure the guards; prisoners did, and this makes all the difference." App. 5. This premise runs contrary to the rule that §1983 does not specifically require "personal participation" as an element of causation, but makes liable those persons who subject or cause others to be subjected to a deprivation of rights, *Sims* v. *Adams,* 537 F.2d 829 (5th Cir. 1976). See also *Smith* v. *Ross,* 482 F.2d 33 (6th Cir. 1973) (holding that a law enforcement officer can be liable under §1983 when by his inaction he fails to perform a statutorily imposed duty). The Constitution is not only a "constraint on the state's power to act," as the Seventh Circuit argues, App. A, 5, but is also a constraint on the state's *failure* to act. See *Estelle* v. *Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Nor does *Martinez* v. *California,* 444 U.S. 277, 285 (1980), support the Seventh Circuit's point on this issue, since the Supreme Court left open the possibility that there may be a proximate relation between injury and cause in a circumstance involving action taken in connection with the release of a prisoner on parole, *Id.* at 285.

II. WHETHER STATE-PROVIDED POST-DEPRIVATION REMEDIES BAR A SUIT BROUGHT UNDER 42 U.S.C. §1983 BY PRISON GUARDS AGAINST A DIRECTOR OF CORRECTIONS AND AN ASSISTANT WARDEN?

Implicit in the opinion of the Seventh Circuit is the premise that the remedies provided by state law to the petitioners are adequate to redress their injuries. This Court has clearly recognized, however, that it is not appropriate for state officials to determine the adequacy of remedies for constitutional wrongs committed by other state officials. As was emphasized in *Mitchum* v. *Foster,* 407 U.S. 225, 242, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972), the very purpose of §1983 was to interpose the federal courts between the state and the people, as guardians of the people's rights. This appreciation of the role of the federal courts as guardian of our rights was affirmed in *Davis* v. *Passman,* 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979), in which the Court stated that justiciable constitutional rights are to be enforced through the courts. It cannot now be seriously maintained that it is to be the duty of appointed workers' compensation commissioners to remedy due process violations. The Illinois Workmen's Compensation Act, Ill. Rev. Stat. 1979 ch. 48, §138.5(a), for example, precludes common law or statutory remedies by employees against their employers, but does not address constitutional issues. Even the legislature recognizes, as this Court has, that once a constitutional violation is found, it is for the federal courts to tailor the scope of the remedy to fit the nature and extent of the violation. *Hills* v. *Gautreaux,* 425 U.S. 284, 96 S.Ct. 1538, 47 L.Ed.2d 792 (1976). Further, it is plain that Congress did not intend for state agencies or courts to be the arbiters of ade-

quate federal remedies, See *Patsy* v. *Bd. of Regents,* 457 U.S. 496, at 502-508, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982).

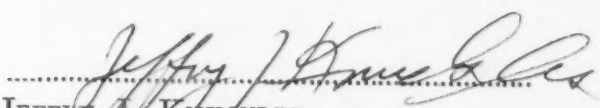
Seemingly against this clearly articulated Congressional and judicial intent stands *Parratt* v. *Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). Yet, *Parratt* is limited by its facts to negligent deprivations of property. *Hudson* v. *Palmer,* ..... U.S. ....., 104 S.Ct. 3194 (1984). *Parratt* has never been extended by this Court to procedural due process violations of life and liberty interests. Whether it should be so extended is an issue upon which there is disagreement among the circuits. See, *e.g., Wilson* v. *Beebe,* 770 F.2d 578 (6th Cir. 1985); *Daniels* v. *Williams,* 748 F.2d 229, 232 (4th Cir. 1984) (*en banc*), cert. granted, ... U.S. ....., 105 S.Ct. 1168, 84 L.Ed.2d 320 (1985); *Thibodeaux* v. *Bordelon,* 740 F.2d 329 (5th Cir. 1984) (favoring extensions); but see *Gilmore* v. *City of Atlanta,* 774 F.2d 1495 (11th Cir. 1985); *Hicks* v. *Feeney,* 770 F.2d 375 (3rd Cir. 1985); *Haygood* v. *Younger,* 769 F.2d 1350 (9th Cir. 1985) (all opposing extension).

Thus, whether state-provided post-deprivation remedies bar this suit and if so, who shall decide whether a given remedy is "adequate", present important federal questions upon which there are conflicts among the circuits. The need for Supreme Court guidance on these issues is clear.

CONCLUSION

For the foregoing reasons, certiorari should be granted to review the judgment of the Court of Appeals.

Respectfully submitted,



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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 85-2057
DALE WALKER, et al.,

Plaintiffs-Appellees,

v.

CHARLES ROWE and DAVID SANDAHL,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 C 5310—William T. Hart, *Judge.*

ARGUED APRIL 18, 1986—DECIDED MAY 19, 1986

Before CUMMINGS, *Chief Judge,* EASTERBROOK, *Circuit Judge,* and NOLAND, *District Judge.**

EASTERBROOK, *Circuit Judge.* The Pontiac Correctional Center is the maximum security prison of Illinois. On July 22, 1978, inmates of Pontiac who were being returned to their cells after exercise in the courtyard killed three guards, injured others, and set fire to part of the prison. Three of the injured guards, and the estates of the three deceased guards, filed this suit against Charles Rowe, then the Director of the Illinois Department of Corrections, and David Sandahl, the Assistant Warden of Opera-

* The Honorable James E. Noland, Chief Judge of the United States District Court for the Southern District of Indiana, is sitting by designation.

tions at Pontiac. They contended that Rowe and Sandahl (together with others since dismissed from the suit) deprived them of their constitutional right to a safe working environment. The jury returned verdicts aggregating $706,845, to which the district court added $145,792 in attorneys' fees and costs. These recoveries came on top of workers' compensation awards and other benefits afforded by state law.[1] Because we conclude that the constitution is not a code of occupational safety, we reverse the judgments.

I

One preliminary matter. The defendants maintain that the suit is one against the state and therefore barred by the eleventh amendment. Certainly so if the suit is against the defendants in their "official capacity," but the "capacity" in which litigation proceeds is largely the plaintiff's choice. If the theory is that the defendant occupied a given office, and the occupant of that office had a duty (one attaching to any occupant of the office) to do such-

[1] The estates of two guards recovered burial expenses plus $250,000 apiece in workers' compensation death benefits. See Ill. Rev. Stat. ch. 48 §138.7. The third estate was eligible for this benefit but did not request it. All three estates received death benefits under life insurance policies paid for by the state, and all were entitled to an extra $20,000 under the Illinois Law Enforcement Officers and Firemen's Act, Ill. Rev. Stat. ch. 48 §281-85. The three injured guards received their full salaries during their recuperation, under the Disability from Injuries in Line of Duty Act, Ill. Rev. Stat. ch. 70 §91. The state was required to pay the full medical expenses of the injured guards under the workers' compensation program, and the parties settled these claims for lump sums. All six plaintiffs also pursued their remedy in the Illinois Court of Claims. The court dismissed their suit, holding the workers' compensation remedies exclusive. *Thomas v. Illinois*, 33 Ill. Ct. Cl. 289 (1980). The guards also could have sued the prisoners who did the deeds, but they did not, doubtless thinking the prisoners judgment proof.

and-such, then we have an "official capacity" suit. It avoids the immunities that apply to "individual capacity" suits but is likely to be brought up short by the eleventh amendment. See *Kentucky v. Graham,* 105 S. Ct. 3099, 3105-06 (1985). If the theory is that the defendant did something that is tortious independent of the office the defendant holds, we have an "individual capacity" suit.

The plaintiff may plead a claim either way, and if he pleads what is naturally an official capacity suit as an individual capacity suit, he avoids the eleventh amendment but confronts a fatal problem—inability to prove personal responsibility. *Duckworth v. Franzen,* 780 F.2d 645, 649-50 (7th Cir. 1985). The plaintiff who says that the occupant of a given office should have done something (by virtue of office) but neglected to do it fails for two reasons: most provisions of the bill of rights do not forbid simple neglect, see *Daniels v. Williams,* 106 S. Ct. 662 (1986) (due process); *Whitley v. Albers,* 106 S. Ct. 1078 (1986) (eighth amendment), and the constitution does not make supervisory officeholders vicariously liable for the acts and omissions of their subordinates, see *Ustrak v. Fairman,* 781 F.2d 573, 575 (7th Cir. 1986); *Duckworth,* 780 F.2d at 650; *McKinnon v. City of Berwyn,* 750 F.2d 1383, 1390 (7th Cir. 1984).

Many of the grounds on which the guards sought to collect damages fail because, if they do not seek to attach liabilities to the office, they seek to hold the defendants responsible for the acts or omissions of others. The plaintiffs say, for example, that Pontiac was unsafe because:

- The prison had "dead spots" hidden from guard towers
- There were too few guards, and 56 authorized positions were vacant because of high turnover
- The prison was overcrowded, with 1,962 inmates in 1,200 cells
- Some of the inmates had formed gangs, and in general "the inmates clearly were in charge" of the prison

- The phone system was new, hard to use, and had defects
- The door and "cage" in the North Cell House were old and flimsy
- The guards did not receive enough training in controlling riots, and the existing training was poor

These and similar complaints have to do with the prison system as a whole. They do not fix individual responsibility on Director Rowe, who did not design a prison with "dead spots," or on Assistant Warden Sandahl, who could not refuse to accept prisoners committed by the courts. They are either attempts to fasten liability on the office, which the eleventh amendment forbids, or attempts to impose vicarious liability on Rowe and Sandahl. Either way, these complaints cannot be the foundation of liability.

II

Some of the acts in question are at least colorably the personal responsibility of the defendants. The jury might have found the following, among other things, and it might have connected these to the decisions of Rowe and Sandahl:

- Although Pontiac had metal detectors, they were not operational
- Although prisoners were known to make weapons in the metal shop, prison officials did not conduct enough random shakedowns of the inmates' cells to find the weapons, and the request of the guards' union for more shakedowns was "not immediately accepted"
- Although Sandahl should have known that the prison was tense, he allowed it to operate on a normal routine instead of "locking down" the prison (that is, locking inmates in their cells)
- When Sandahl (who was at home) learned that a riot was in progress, he did not immediately issue shotguns to the tactical squad and order

> it to quell the disturbance; instead Sandahl put Major Lowery in charge, and Major Lowery did not issue shotguns until Sandahl arrived and ordered their issuance more than an hour later

Our question is whether acts and omissions of this character, which arguably increased the danger to which the guards were exposed, violate the constitution. The district court held that they do, both before trial, when it denied a motion to dismiss, see 535 F. Supp. 55, 58 & n.5 (N.D. Ill. 1982), and after trial, when it denied a motion for judgment n.o.v. We may assume that Rowe and Sandahl knew that these acts and omissions increased the risk of injury facing the guards and after full deliberation decided to do nothing. We may assume that the decision to accept these risks was negligent, meaning that the costs of reducing the risks were less than the benefits (the harms avoided, discounted by the probability that there would be a riot). We may even assume that the decision to accept these risks was grossly negligent (meaning that the costs were substantially less than the anticipated benefits). The answer to the question is no, under any of these assumptions.

The defendants did not kill or injure the guards; prisoners did, and this makes all the difference. See *Martinez v. California,* 444 U.S. 277, 285 (1980). To see why, consider the language of the due process clause of the fourteenth amendment, on which the guards rely: "[N]or shall any State *deprive* any person of life, liberty, or property, without due process of law . . ." The constitution requires that the state to grant "process" before it deprives people of life, liberty, or property. It is a constraint on the state's power to act, a prohibition on the misuse of official power. *Daniels v. Williams,* 106 S. Ct. at 665-66. It does not require the state to guarantee life, liberty, or property against invasion by private actors; it requires only that the state not act, unless with due process, when life, liberty, or property are in the balance.

"Due process" does not mean "due care." *Davidson v. Cannon,* 106 S. Ct. 668, 670 (1986). We concluded in *Bowers v. DeVito,* 686 F.2d 616 (7th Cir. 1982), that because the bill of rights is a charter of negative liberties, the state need not protect people from danger. See also *Hinman v. Lincoln Towing Service, Inc.,* 771 F.2d 189, 194 (7th Cir. 1985). *Bowers* held that the state has no constitutional obligation to keep aggressive people out of free society. Subsequent cases have held, among other things, that the police have no constitutional duty to save people in danger. *Beard v. O'Neal,* 728 F.2d 894, 899 (7th Cir.) (person known to be threatened by criminal), *cert. denied,* 105 S. Ct. 104 (1984); *Jackson v. City of Joliet,* 715 F.2d 1200 (7th Cir. 1983) (person in burning car), *cert. denied,* 465 U.S. 1049 (1984). The bill of rights is designed to protect people from the state, not to ensure that the state supplies minimum levels of safety or comfort.

Governments regularly sacrifice safety for other things. A city may decide to spend more money on parks or education and less on police, even though its officials know that the expenditure on police would reduce the cost of crime by more than the expenditure on the police. It may do this without answering in damages to people subsequently mugged in the parks. The police department may decide to hire more police and give each one less costly equipment. One predictable result is that the police will suffer more auto accidents in high speed chases than they would if the city used sports cars as patrol vehicles. The city may choose the kind of car it will furnish to the police without explaining to a jury in a §1983 suit why it picked Chevrolet sedans rather than safer and faster Audi 5000 Turbo Quattros. The level of safety to be provided *by* the police to the people—like the level of safety to be provided *to* the police and prison guards—is determined by political and economic forces, not by juries implementing the due process clause. People through the democratic process may choose more or less "crime in the streets" by altering their support of the police, the courts,

social welfare programs, and economic policies stimulating growth; so too they may alter their support of safety programs for prison guards. And they may choose how to deal with the risks that inhere in prisons—they may choose to provide greater safety through designing new prisons and doubling the number of guards, or they may choose to afford remedies such as workers' compensation, insurance, and special payments to injured guards.

The safety of guards and other employees of the state is affected as much by the guards themselves as by the choices made by the state. Would-be guards must decide whether to take the job—with a given mix of salary, safety, and compensation for injury—or to seek work elsewhere. The state may not dragoon people to be guards. Would-be guards, represented by their labor unions, may decide to accept a little less safety in exchange for a little higher pay. Cf. *Camacho v. Ritz-Carlton Water Tower,* 786 F.2d 242 (7th Cir. 1986). Having decided that the combination of pay, benefits, and safety is satisfactory, the guards cannot turn around and say that the constitution required that safety be a larger component of the total package. The constitution no more assures a safe job than it does a job with a generous salary. Cf. *Vance v. Bradley,* 440 U.S. 93, 101-02, 106-09 (1979).

The constitution does not assure employees of the government better terms or working conditions or amenities than those available in private employment. *May v. Evansville-Vanderburgh School Corp.,* No. 85-2234 (7th Cir. Apr. 1, 1986), slip op. 4-8. True, some portions of the constitution regulate the public employment relationship. For example, a public employee may not be fired for speech on matters of public concern, and he must be given an appropriate hearing before being fired if he has a "property" interest in his job. But none of these particular rules is involved in this case. We therefore hold that the due process clause does not assure safe working conditions for public employees. Accord, *McClary v. O'Hare,*

786 F.2d 83, 88-89 (2d Cir. 1986).[2] Cf. *Hayes v. Vessey*, 777 F.2d 1149, 1151-52 (6th Cir. 1985) (assuming that an employee has a constitutional right to be free of rape in the workplace but holding that workers' compensation remedies under state law are sufficient "process" for unauthorized, criminal acts at work). See also *Daniels v. Williams, supra; Baker v. McCollan*, 443 U.S. 137 (1979); and *Paul v. Davis*, 424 U.S. 693 (1976), all holding that the constitution does not duplicate duties of care in the common law of torts.

This conclusion may seem in tension with the rule that the state must protect prisoners and others in its charge. See *Davidson v. Cannon* (assuming that harm caused by an attack that could have been prevented, but because of wrongful intent or deliberate indifference was not, might be basis of liability under the due process clause); *Watts v. Laurent*, 774 F.2d 168, 172 (7th Cir. 1985) (holding this), *cert. denied*, 54 U.S.L.W. 3630 (U.S. Mar. 24, 1986); *Estelle v. Gamble*, 429 U.S. 97 (1976) (eighth amendment requires state to exercise some care in affording medical assistance to prisoners). See generally

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[2] *McClary* was brought by the estate of a construction worker killed when a wire cable on a crane broke, bringing the boom down on the worker. The estate argued that the state "deliberately disregarded and violated state laws, rules, and regulations for occupational safety and the operation of mobile cranes thereby creating a high risk of danger to the decedent" (786 F.2d at 85). The Second Circuit held that even "deliberate" exposure of public employees to "high risk" does not violate the constitution because it is not an abuse of governmental power. "[W]hatever abuses O'Hare committed were abuses of authority that he held as an employer; identical actions could have been carried out by a private employer . . . . We do not think that improper actions taken by employers violate an employee's [constitutional] rights simply because the employer is a government official." *Id.* at 89.

Duckworth v. Franzen, 780 F.2d at 651-56. The district court drew on these and related cases when denying the defendants' motion for judgment n.o.v., stating that although these "deliberate indifference" cases are based on the eighth amendment, "the broader due process analysis is not limited to prisoners." It is not "limited to prisoners," but it is limited by the rationale for requiring the state to furnish protection. These cases are based on the principle that when the state takes someone into its care or cuts off sources of private aid, the state must afford replacement protection. So when the state imprisons a person and prevents his ambling down to the family physician, the state must provide some medical care. When the state arrests the adult having custody of a child, the state had better take care of the child. *White v. Rochford,* 592 F.2d 381 (7th Cir. 1979). Sometimes we shorten this inquiry to a search for a "special relationship" between the state and the person to be protected. *Ellsworth v. City of Racine,* 774 F.2d 182, 185 (7th Cir. 1985), *cert. denied,* 106 S. Ct. 1265 (1986). Whatever the name, the rationale lies in constraints the state imposes on private action. As the court put the point in *Bowers,* 686 F.2d at 618, all of these cases are variations on the principle that "[i]f the state puts a man in a position of danger from private persons and then fails to protect him . . . it is as much an active tortfeasor as if it had thrown him into a snake pit." If a press gang had picked up people from the streets and forced them to be guards at Pontiac, this line of cases would require the state not to be indifferent to the guards' working conditions. But the state did not draft its guards; they enlisted, on terms they found satisfactory, and they were free to quit whenever they pleased. The state must protect those it throws into snake pits, but the state need not guarantee that volunteer snake charmers will not be bitten. It may not throw Daniel into the lions' den, but if Daniel chooses to be a lion tamer in the state's circus, the state need not separate Daniel from his charges with an impenetrable shield.

A contrary holding would make the warden's life parlous indeed. The guards say that Director Rowe and Assistant Warden Sandahl must pay damages because they did not have enough "shakedowns" of cells in 1978 looking for

weapons. But until the Supreme Court decided *Hudson v. Palmer,* 104 S. Ct. 3194 (1984), a warden risked liability to the prisoners under the fourth amendment every time he ordered a shakedown. The guards say that Sandahl should have "locked down" the prison to reduce the risk of violence. But Pontiac had been locked down for six of the ten weeks preceding the riot, and the eighth amendment may have something to say about keeping prisoners locked two to a cell for weeks or months on end out of an unverifiable fear that if they were let out to exercise there might be trouble. Compare *Caldwell v. Miller,* No. 84-2522 (7th Cir. May 8, 1986), with *French v. Owens,* 777 F.2d 1250, 1251-56 (7th Cir. 1985). The guards say that Sandahl, reached by phone at home, should have ordered the tactical squad to be armed with shotguns and sent into the troubled part of the prison immediately. But if the shotguns had been used, Sandahl quickly would have been charged with constitutional torts against the victims. *Whitley v. Albers* holds that prison officials may use weapons to quell disturbances if they reasonably conclude that this is the best way to save the lives of all; the Court did not hint that orders hastily issued from an Assistant Warden's living room would meet this standard.

Pontiac is a den of murderers, rapists, and others with no respect for the law—and all too often nothing to lose from further mayhem. Cf. *United States v. Fountain,* 768 F.2d 790, 793-94, 803-04 (7th Cir. 1985). If there are few guards, the prisoners will murder each other; if the guards are present in abundance, the guards may become the targets; if the guards lock the prisoners in their cells, all will suffer to prevent violence by a few. There is no solution within the reach of a federal court, no easy recourse in the due process clause of the fourteenth amendment. The state has many choices, all costly, many bound to end in tragedy for someone. It may make these tragic choices for itself.

REVERSED

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT EASTERN DIVISION

Case Title

Dale E. Walker, et al.,

v.

Charles Rowe, etc. et al.,

Docket Number
80 C 5310
Name of Judge
WILLIAM T. HART

[x] Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[ ] Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment is hereby entered on the jury verdicts in favor of plaintiff, Dale E. Walker, in the amount of $57,665 as actual damages; in favor of plaintiff, Sharon D. Patchett, in the amount of $38,350 as actual damages; in favor of plaintiff, Estate of William N. Thomas, in the amount of $120,000 as actual damages; in favor of plaintiff, Danny Dill, in the amount of $187,500 as actual damages; in favor of plaintiff, Estate of Stanley E. Cole, in the amount of $112,500 as actual damages; and in favor of plaintiff, Estate of Robert J. Conkle, in the amount of $190,830 as actual damages, and against defendants David Sandahl and Charles Rowe. Judgment entered in favor of said plaintiffs' in the amount of zero dollars as punitive damages against defendants David Sandahl and Charles Rowe.

(Filed Oct 10 1984)

Clerk
H. STUART CUNNINGHAM
(By) Deputy Clerk
/s/ William J. Stasiek
William J. Stasiek
Date OCT. 10, 1984

Minute Order Form

(1/85e)

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Case Number	80 C 5310	Date	MAY 20, 1985
Name of Assigned Judge	WILLIAM T. HART	Sitting Judge if Other Than Assigned Judge	
Case Title	DALE WALKER, et al. v. CHARLES ROWE, et al.		

MOTION: (In the following box (a) indicate the party filing the motion. e.g., plaintiff. defendant. 3d-party plaintiff. and (b) state briefly the nature of the motion being presented.)

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) [X] Judgment is entered as follows. (2) [ ] [Other docket entry:]

Pursuant to Memorandum Opinion and Order, IT IS ORDERED that: (1) The motion of defendants Charles Rowe and David Sandahl for judgment notwithstanding the verdict is denied. (2) Plaintiff's motion for attorneys' fees and costs is granted in part and denied in part. Judgment shall enter in favor of plaintiffs and against defendants in the amount of $145,792.50.

(3) [ ] Filed motion of [use listing in "MOTION" box above]

(4) [ ] Brief in support of motion due

(5) [ ] Answer brief to motion due Reply to answer brief due

(6) [ ] Hearing / [ ] Ruling on set for at

(7) [ ] Status hearing [ ] held [ ] continued to [ ] set for [ ] re-set for at

(8) [ ] Pretrial conference [ ] held [ ] continued to [ ] set for [ ] re-set for at

(9) [ ] Trial [ ] set for [ ] re-set for at

(10) [ ] [ ] Trial [ ] Hearing held and continued to at

(11) [ ] This case is dismissed [ ] without [ ] with prejudice and without costs [ ] by agreement [ ] pursuant to [ ] FRCP 41(a)(1) [ ] FRCP 41(a)(2) [ ] FRCP 4(m) failure to serve [ ] General Rule 21 (want of prosecution)

(12) [X] DRAFT (For further detail see order [ ] on the reverse of [X] attached to the original minute order form.)

[ ] No notices required

[X] Notices mailed by judge's staff

[ ] Notified counsel by telephone

[ ] Docketing to mail notices

[ ] Mail CIV-31 form

courtroom deputy's initials

Date time received in central Clerk's Office

number of notices

date typed envelopes

date docketed

date mld notices

mailing dpty initials

Document #

— 13a —

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 80 C 5310

DALE WALKER, et al.,

Plaintiffs,

v.

CHARLES ROWE, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the motion of the defendants Charles Rowe and David Sandahl for judgment notwithstanding the verdict and the motion of plaintiffs for the allowance of attorneys' fees and costs.

I

Defendants contend that this action, which was brought to recover damages for violation of plaintiff's and decedents' rights not to be deprived of life or liberty without due process of law in violation of the Fourteenth Amendment, is precluded because Illinois state law provides an adequate post-deprivation remedy. Citing *Hudson* v. *Palmer*, ... U.S. ....., 104 S. Ct. 3194 (1984); *Parratt* v. *Taylor*, 451 U.S. 527 (1981); and *Hayes* v. *Johnson*, 578 F. Supp. 685 (E.D. Mich. 1983), defendants contend that the Illinois Worker's Compensation Act, Ill. Rev. Stat. 1979, ch. 48, § 138.8(b)4.2, provided an adequate and exclusive remedy for any injuries suffered.

For the reasons stated in this court's opinion denying defendants' motion to dismiss in this case (*Walker* v. *Rowe*, 535 F. Supp. 55 (N.D. Ill. 1981) (Aspen, J.)) the administrative remedy clearly was not exclusive. By its terms the Illinois Worker's Compensation Act did not preclude an action for a constitutional violation. The question of whether a remedy in the form of an adminis-

trative claim could be deemed an adequate post-deprivation remedy for deprivation of constitutional rights was not, however, addressed in the previous ruling of this Court passing on defendants' motion to dismiss.

As defendants state, *Hayes* v. *Johnson, supra,* held that a compensation claim was an adequate and complete post-deprivation remedy for a prison teacher who was raped by inmates. This case appears to be in point, but this Court respectfully disagrees with the conclusion in the *Hayes* case. Based on the reasoning of the Supreme Court in *Carlson* v. *Green,* 446 U.S. 14 (1980) and the holding of the Court of Appeals for the Seventh Circuit in *Bell* v. *City of Milwaukee,* 746 F.2d 1205 (1984), this Court is of the view that an administrative claim which limits the amount of compensatory damages, does not provide for punitive damages and does not provide for a jury trial is not an adequate post-deprivation remedy.

In *Carlson* v. *Green,* the Supreme Court held that a *Bivens* remedy was available against a federal official to vindicate Eighth Amendment rights even though the claim would also support a suit against the United States under the Federal Tort Claims Act. The Supreme Court stated:

> Four additional factors, each suggesting that the *Bivens* remedy is more effective than the FTCA remedy, also support our conclusion that Congress did not intend to limit respondent to an FTCA action. First, the *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose. *See Butz* v. *Economou, supra,* at 505. Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States. It is almost axiomatic that the threat of damages has a deterrent effect, *Imbler* v. *Pachtman,* 424 U.S. 409, 442 (1976) (White J., concurring in judgment), surely particularly so when the individual official faces personal financial liability.

Petitioners argue that FTCA liability is a more effective deterrent because the individual employees responsible for the Government's liability would risk loss of employment and because the Government would be forced to promulgate corrective policies. That argument suggests, however, that the superiors would not take the same actions when an employee is found personally liable for violation of a citizen's constitutional rights. The more reasonable assumption is that responsible superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity.

Second, our decisions, although not expressly addressing and deciding the question, indicate that punitive damages may be awarded in a *Bivens* suit. Punitive damages are 'a particular remedial mechanism normally available in the federal courts,' *Bivens,* 403 U.S., at 397, and are especially appropriate to redress the violation by a Government official of a citizen's constitutional rights. Moreover, punitive damages are available in 'a proper' § 1983 action, *Carey* v. *Piphus,* 435 U.S. 247, 257, n. 11 (1978) (punitive damages not awarded because District court found defendants 'did not act with a malicious intention to deprive respondents of their rights or to do them other injury'), and *Butz* v. *Economou,* suggests that the 'constitutional design' would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression. 438 U.S., at 504. But punitive damages in an FTCA suit are statutorily prohibited. 28 U.S.C. § 2674. Thus FTCA is that much less effective than a *Bivens* action as a deterrent to unconstitutional acts.

Third, a plaintiff cannot opt for a jury in an FTCA action, 28 U.S.C. § 2402, as he may in a *Bivens* suit. Petitioners argue that this is an irrelevant difference because juries have been biased against *Bivens*

> claimants. Reply Brief for Petitioners 7, and n. 6; Brief for Petitioners 30-31, n. 30. Significantly, however, they do not assert that judges trying the claims as FTCA actions would have been more receptive, and they cannot explain why the plaintiff should not retain the choice.

In *Carlson* v. *Green,* the Supreme Court was addressing the issue of Congressional intent with regard to preemption by a given remedy rather than whether that remedy is adequate to meet due process standards. Nonetheless, this Court believes that by analogy, and for the reasons stated in *Carlson* v. *Green,* a non-jury, administrative remedy which places a limit on the type and amount of compensatory damages and does not provide for punitive damages is not an adequate post-deprivation substitute for an action under Section 1983. See to the same effect *Bell* v. *City of Milwaukee,* 746 F.2d at 1238, n.39 and 1252 n.59 (analysis of adequacy of state law post-deprivation remedies for claims of deprivation of life without due process of law (substantive due process claim based on Fourth and Fourteenth Amendments) and of deprivation of the parents' liberty interest in the parent-child relationship (based solely on the Fourteenth Amendment)).

The Court is aware of the Supreme Court's refusal in *Parratt* to find the absence of punitive damage and a jury trial to be determinative. 451 U.S. at 544-45. However, the Supreme Court noted that "the remedies provided could have fully compensated the [injured party]." In contrast, the Worker's Compensation Act does not pur port to fully compensate an injured worker. Rather, it sets forth a schedule of discrete amounts recoverable for loss of use of parts of the body and for death. Notably, however, no compensation is allowed for pain and emotional damages which are clearly compensable items in this case. Moreover, amounts awarded under the Compensation Act are not *individualized* efforts to fully compensate, but represent an attempt to establish a compromise

between employer and employee. This compromise includes a *generalized* attempt to resolve such factors as the comparative fault of the employer and employee and the uncertainties and costs of litigation. The agenda of the Worker's Compensation Act is far broader than fully compensating individual plaintiffs, which is the primary goal of a § 1983 action.

Defendants also contend that because the jury awarded less than the Worker's Compensation Act cap in damages that this is evidence that the administrative remedy provided by Illinois law was an adequate post-deprivation remedy. Defendants forget that they insisted on informing the jury of the compensation awards granted to the plaintiffs and to the decedents' estates. This evidence was admitted without objection on the part of the plaintiffs to avoid any contention that the amounts awarded by the jury would be subject to an offset for amounts received under the Act. In effect, then, the jury was invited to award only an amount representing the difference between plaintiffs' damages and the amount already awarded under the Act. Under these circumstances, the level of the jury awards is not proof of the adequacy of the administrative remedy.

II

Defendants have moved for judgment notwithstanding the verdict pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. The standard which must be followed requires that the evidence with all inferences to be reasonably drawn therefrom be viewed most favorably to the parties opposing the motion. If in a fair and impartial exercise of their judgment the jury could reach the conclusions which favored the plaintiffs, the verdict may not be set aside.

The court instructed the jury that in order to find one of the defendants deprived one of the plaintiffs of his or her life or liberty without due process of law it must find

that the defendant acted or failed to act knowing that his act or omission would endanger the plaintiff or with deliberate or reckless indifference to that plaintiff's safety. The record supports a conclusion by a reasonable jury that the Pontiac institution was unreasonably dangerous. Reasonable minds might also find, on the evidence, that after the riot began, the defendants failed to take necessary actions to quell the riot and come to the aid of the plaintiffs.

Expert and other testimony support the conclusion that conditions at Pontiac were unreasonably dangerous due to a variety of conditions, including poor or nonexistent communications, inadequately trained and understaffed personnel, overcrowded inmate conditions, and inadequate security. There were locations in the institution where officers could not be seen nor could they be heard. There is evidence that complaints and reports from officers were ignored, metal detectors were inoperable or not used, shakedowns were few, and policies with respect to deadlocks were unclear. Plaintiffs' expert testified that conditions at the institution contributed to the riot, injuries and deaths of the staff.

On the basis of the evidence presented the court concludes that the jury's verdict is supported by the evidence and cannot be set aside.

III

The defendants have incorporated by reference their arguments before and at trial with regard to their qualified immunity from damages. In *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982), the Supreme Court restricted the previous "good faith" immunity accorded to public officials to its objective component. Public officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established or constitutional rights of which a reasonable person would have known." *Davis* v. *Scherer,* 104 S. Ct. 3012, 3018 (1984) (quoting

Harlow, 457 U.S. at 818). Two principles govern the application of the *Harlow* standard to these defendants. "A reasonably competent public official is expected to know the law governing his conduct." *Bates* v. *Jean,* 745 F.2d 1146, 1152 (7th Cir. 1984) (citing *Crowder* v. *Lash,* 687 F.2d 996, 1007 (7th Cir. 1982)). The relevant time when the rights must be clearly established is the time of the violation. *Davis,* 104 S. Ct. at 3019-20.

The constitutional rights asserted by the plaintiffs are their Fourteenth Amendment rights not to be deprived of life and liberty without due process of law. It is beyond dispute that the plaintiffs' interests in life and liberty in the form of freedom from injury were clearly established at the time of the riot. Defendants argue that it was not clearly established that the type of deprivation suffered here (attack on guards by rioting inmates) constituted a deprivation by the State without due process. Although the parties have not directed the Court's attention to, and the Court has not found, a pre-1978 decision which holds squarely that based on the factual situation here a deprivation of life or liberty of prison guards without due process has occurred, the proposition was clearly established by related holdings. "'[W]hile an official has, of course, no duty to anticipate unforeseen constitutional developments,' he cannot hide behind a claim that the particular factual predicate in question has never appeared *in haec verba* in a reported opinion. If the application of settled principles to this factual tableau would inexorably lead to a conclusion of unconstitutionality, a prison official may not take solace in ostrichism." *Little* v. *Walker,* 552 F.2d 193, 197 (7th Cir. 1977), *cert. denied,* 435 U.S. 932 (1978) (citation omitted).

Long before the date of the riot at the Pontiac correctional facility, convicted prisoners were afforded protection from injury resulting from the "callous indifference" of prison officials. *See, e.g., Estelle* v. *Gamble,* 429 U.S. 97, 104-5 (1976) (deliberate indifference to serious medical needs); *Little* v. *Walker, supra* (deliberate indif-

ference to likelihood of assault by other inmates). This protection was based on the Eighth Amendments' prohibition of cruel and unusual punishment. Subsequently, the rationale of these decisions was extended to protect unconvicted detainees under the auspices of the Due Process Clauses of the Fifth and Fourteenth Amendments. *See, e.g., Spence* v. *Staras,* 507 F.2d 554 (7th Cir. 1974) (failure to protect mental hospital inmate). This Due Process Clause analysis also was applied to the liberty interests of a wide variety of persons other than prisoners. *Ingram* v. *Wright,* 430 U.S. 651 (1977) (school childrens' claim of deprivation of liberty through corporal punishment); *White* v. *Rochford,* 592 F.2d 381 (7th Cir. 1979) (children abandoned without adult supervision by police who arrested their uncle). The same analysis was also applied beyond the interest in avoiding punishment prior to conviction, to the entire spectrum of interests protected by the Due Process Clause. *Bonner* v. *Couglin,* 545 F.2d 565 (7th Cir. 1976) (prisoner's right to property).

Although admittedly borrowed from the Eighth Amendment, the broader due process analysis is not limited to prisoners. Nor have the defendants identified authority which limits the "deliberate indifference" analysis to those in custody. Although decided subsequently to the violation involved here, *White* v. *Rochford, supra* and *Bowers* v. *DeVito,* 686 F.2d 616 (7th Cir. 1982) both support the generalized application of the "deliberate indifference" standard to the injury suffered by these plaintiffs. In *Bowers,* the Seventh Circuit noted that the liability of prison officials to inmates under a "deliberate indifference" due process theory was simply one example of the more general rule that "[i]f the state puts a man in a position of danger from private persons and then fails to protect him . . . it is as much an active tortfeasor as if it had thrown him into a snake pit." 686 F.2d at 618. *See also Jackson* v. *Byrne,* 738 F.2d 1443, 1446-47 (7th

Cir. 1984) (state required to protect individuals "with whom the state had created a custodial *or other special relationship*," (emphasis added)). These cases represent a reiteration of principles well-settled prior to the Pontiac prison riot, rather than new developments in constitutional law.

Further evidence that during 1978 prison guards shared with inmates a constitutional right to protection from assault by inmates is found in those decisions limiting inmate rights. To justify limitations on prisoners rights, courts relied on the prison officials' duty to maintain "institutional security," defined in part as "ensur[ing] the safety of inmates and *corrections personnel*." *Bell* v. *Wolfish*, 441 U.S. 520, 546-47 (1979) (emphasis added). *See also Soto* v. *Dickey*, 744 F.2d 1260, 1269 (7th Cir. 1984) (citing in the same breath the need to protect both "correctional personnel" and inmates as justifying limited macing of uncooperative inmates). Hofeldian distinctions between discretionary rights and mandatory duties aside, reasonable prison officials could not expect to justify certain actions with the need to protect prison personnel and then disclaim any duty to do so when those personnel demanded such protection. "The prison officials' *responsibility* extends to the protection of the guard, as well as to the inmates. The safety of the institution's guards and inmates is perhaps the most fundamental responsibility of prison administration." *Soto*, 744 F.2d at 1270 (citing *Hewitt* v. *Helms*, 459 U.S. 460, 473 (1983)).

IV

To properly evaluate the plaintiffs' motion for allowance of attorney's fees and costs, the procedural background of this case must be examined. Plaintiffs Walker, Patchett, Thomas, D. Dill, N. Dill, and Cole filed their original complaint against defendants Governor James Thompson, Director Charles Rowe, Warden Thaddeus Pinkney, and other employees. Defendant Thompson filed a motion to dismiss which was granted on March 5, 1981.

On or about April 15, 1981, plaintiffs filed a second amended complaint adding the estate of Robert J. Conkle as a plaintiff, and adding David Sandahl, William O'Sullivan, William Shehorn, and Louis Lowery as defendants. Defendants O'Sullivan, Shehorn, and Lowery filed a motion to dismiss the first amended complaint. The motion of defendants, Sheborn and Lowery was granted January 27, 1982. Prior to trial the Court dismissed the Estate of Thaddeus Pinkney as a defendant as no legal representative for the estate existed.

At the close of plaintiffs' case, defendants moved for a directed verdict against plaintiff Natalie Dill which was granted by the court. The trial began on September 13, 1984 and was completed in 13 trial days. The jury returned a verdict on liability in favor of defendant O'Sullivan and against defendants Rowe and Sandahl. Two of the seven named defendants were found liable to six of the seven named plaintiffs. Plaintiffs in their closing argument asked the jury to award over three million dollars in compensatory damages plus an unspecified amount for certain compensatory damages, and significant punitive damages. Defendants in their closing argument suggested that the jury award in the area of $550,000.00 in compensatory damages and no punitive damages. The jury returned its verdict on October 10, 1984 in the following amounts: Dale Walker - $57,665; Danny Dill - $187,500; Sharon Patchett - $38,350; Estate of Stanley Cole - $112,500; Estate of Robert Conkle - $190,830; and the Estate of William Thomas - $120,000. The verdicts total $706,845.

The amount of the fees and costs to be awarded must be determined on the facts of each case. *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983). The determination of the amount of fees and costs to be awarded is within the sound discretion of the Court. *Johnson ex rel. Johnson* v. *Brelje*, 701 F.2d 1201, 1211 (7th Cir. 1983).

In determining the amount of the award, twelve factors have been set forth to guide a court in making an award. The twelve factors are:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

See Hensley v. *Eckerhart*, 103 S. Ct. at 1937; *Muscare* v. *Quinn*, 614 F.2d 577, 579 (7th Cir. 1980).

A. Costs

Plaintiffs' costs petition which is attached to the petition as Schedule D seeks costs in the amount of $2,865.89. In this amount there are two charges for research by a law clerk in the amounts of $110.50 and $112.00 for unidentified work. Defendants suggest that a costs award of $2,642.50 would reasonably compensate counsel for his costs to which he is entitled under Section 1988. This amount represents the amount sought minus the law clerk charges for unidentified work and will be allowed.

B. Fees for Attorney and Law Clerk Time

Plaintiffs seek $217,718.58 in fees for attorney and law clerk time on this case by eight different attorneys associated with three firms and unidentified law clerks.

Jeffry Knuckles has requested an award of fees in the amount of $113,947.80 which represents 911 hours and 35 minutes at a rate of $125.00 per hour. This amount repre-

sents time charged during the period June 1, 1983 to October 20, 1984, during which time Mr. Knuckles was a sole practitioner. Terry Ekl, who represented only Danny Dill, has requested $61,229.80 which covers 498 hours charged by three attorneys in his firm and 14 law clerk hours. Fawell, James and Brooks, Mr. Knuckles' former employer has requested $45,489.58 representing 542 hours and 35 minutes of attorney time by five different attorneys at various rates and 57 law clerk hours.

According to plaintiffs' petition, a contingency fee arrangement exists between all clients and Fawell, James and Brooks, whereby the Fawell firm, is entitled to one-third of the total verdict. Such a contingency fee amounts to $235,615.00, based on the total verdict of $706,845.00. It is unclear as to whether the verdict obtained for Danny Dill ($187,500.00) is subject to this contingency contract and Mr. Ekl has not indicated to the court whether he has any contingency fee arrangement with Danny Dill.

Defendants contend that the billing rates charged for attorney time are excessive and unwarranted, and further that plaintiffs have failed to adequately set forth the qualifications and experience of each attorney to justify the rate requested. Further, the number of hours requested is asserted to be unjustified.

Plaintiffs have failed to adjust their billing rates for in court time, out of court time, and travel time. Instead counsel have applied a single universal billing rate which applies no matter what the nature of the time being billed.

During the period June 1, 1983 to October 20, 1984 Mr. Knuckles represented plaintiffs as a sole practitioner and claims a rate of $125.00 per hour for in court time, out of court time, and travel time. This case was Mr. Knuckles first federal civil jury trial, although he has considerable state trial experience.

The billing rates of two partners in Fawell, James and Brooks, of $85.00 per hour indicate that the rate of $125.00

per hour is not customary. The Fawell firm is also located in Naperville and is well established. On May 31, 1983 Mr. Knuckles' billing rate as a partner at Fawell, James & Brooks was $85.00 per hour.

Defendants suggest that a billing rate for Mr. Knuckles time as a solo practitioner of $100.00 per hour for in court time and $75.00 per hour for out of court time would be appropriate.

Connolly and Ekl is located in the same geographic area as Mr. Knuckles and Fawell, James and Brooks. Plaintiffs' petition provides a sketchy synopsis of Mr. Ekl's experience and makes reference to Mr. Connolly's experience. The petition makes no reference whatsoever to the experience of the other attorney in the firm charging time, Patrick Williams.

A rate of $125.00 per hour for Mr. Ekl and Mr. Connolly is unsupported by the petition and is not customary in light of the billing rates at Fawell, James and Brooks. Defendants suggest a billing rate of $100.00 per hour for in court time and $75.00 per hour for out of court time would be appropriate for Mr. Ekl and Mr. Connolly.

Defendants agree that $20.00 per hour is an appropriate billing rate for law clerks for all three firms. Defendants also contend that the number of hours requested by counsel for the plaintiffs is excessive. Plaintiffs' counsel has detailed the hours spent on this matter in their fee petition. However, it does not follow that the amount of time actually expended is the amount of time reasonably expended. *Copeland* v. *Marshall,* 641 F.2d 880, 891 (D.C. Cir. 1980). Counsel are not entitled to fees for matters concerning Natalie Dill, who was directed out, William O'Sullivan, who was found not guilty, and the dismissed defendants Governor Thompson, Estate of Thaddeus Pinkney, Louis Lowery, and William Shehorn.

If more than one attorney is involved, the possibility of duplication of effort along with the proper utilization of time should be scrutinized. The court has reviewed the docket entries to obtain an overview of the case activity and includes a copy of them as part of the record.

Because plaintiffs have not prevailed on all claims against all defendants they are not entitled to recover payment for all time expended. In general, to recognize the elimination of this time and some excess time the court has accepted the time eliminations proposed by the defendants for the time of Messrs. Knuckles and Ekl.

Accordingly, Mr. Knuckles total hours have been reduced from 911 to 790. Based on an in court hourly rate of $125.00 per hour for 100 hours and on an out of court rate of $85.00 the fee allowed to Mr. Knuckles is $71,150.

Mr. Ekl who represented one client and assisted Mr. Knuckles during part of the trial is allowed 80 hours in court time at the rate of $100.00 per hour and 400 out of court hours at the $85.00 per hour rate at which Mr. Ekl's firm bills his time for a total allowance of $42,000.

Utilizing $75.00 and $85.00 an hour rates and accepting the deductions proposed by defendants the law firm of Fawell, James and Brooks is allowed $30,000 for the time of its partners, associates and clerks.

Total attorneys fees allowed are $143,150. This amount also takes into account the age and experience of counsel, the difficulty of the matters presented, the time during which the matter was presented, the results obtained, the contingent fee arrangement, and awards in similar cases. The court judges all of these factors to merit average to above consideration, with the result that counsel are fairly rewarded for their efforts and the defendants are not penalized by the fees allowed. Defendants recommend that the fees be reduced to $126,614. The court believes

that the factors considered merit the relatively small increase over defendants' recommendation.

IT IS THEREFORE ORDERED that:

(1) The motion of defendants Charles Rowe and David Sandahl for judgment notwithstanding the verdict is denied.

(2) Plaintiff's motion for attorneys' fees and costs is granted in part and denied in part. Judgment shall enter in favor of plaintiffs and against defendants in the amount of $145,792.50.

ENTER:

/s/ William T. Hart
United States District Judge

Dated: May 20, 1985

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DALE E. WALKER; SHARON D. PATCHETT; MELBA JEAN THOMAS as administrator of the estate of William N. Thomas, deceased; DANNY DILL; NATALIE DILL; SANDRA N. COLE as administrator of the estate of Stanley E. Cole, deceased; ROBERT CONKLE as administrator of the estate of Robert J. Conkle, deceased, Plaintiffs,	)	
v.	)	NO. 80 C 5310
CHARLES ROWE, former director of the Department of Corrections; THADDEUS PINCKNEY, former warden, Pontiac Correctional Center; DAVID SANDALL and WILLIAM O'SULLIVAN, former assistant wardens, Pontiac Correctional Center, WILLIAM SHEHORN; LOUIS LOWERY, Defendants.	)	

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

Plaintiffs are three former correctional officers, one of their wives and three administrators of the estates of correctional officers who died in an inmate riot at the Pontiac Correctional Center on July 22, 1978. Plaintiffs' cause of action is brought pursuant to 42 U.S.C. § 1983 on the theory that various state corrections officials deprived them of their constitutional rights by failing to take action to prevent the July 22, 1978, riot and its tragic consequences. Defendant William O'Sullivan, former as-

sistant warden at the correctional center and defendants William Shehorn and Louis Lowery, former correctional officers at Pontiac, have moved to dismiss this claim for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted.[1] Fed.R.Civ.P. 12(b)(1) and (6).

Plaintiffs' complaint seeks redress for defendants' alleged failure to take steps to control, if not prevent, the violence which occurred at the Pontiac Correctional Center on July 22, 1978. Although the complaint contains 29 separate allegations, the thrust of plaintiffs' claim involves defendants' failure to warn plaintiffs of an impending prison disturbance, to operate, equip and maintain the Pontiac facility in a safe manner in the months preceding the riot, to provide adequate training and supervision of prison personnel, and to promulgate and enforce sufficient safety rules in the prison as required by state law. Taken as true for purposes of this motion, *Haines* v. *Kerner,* 404 U.S. 519, 520-21, 92 S.Ct. 594 (1972), these facts do state a claim for which relief can be granted as to defendant O'Sullivan. For the reasons stated below, however, this Court holds that plaintiffs' complaint does not state a claim for which relief can be granted as to defendants Shehorn or Lowery.

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[1] Defendants also argue that Judge Grady's decision in Local 494, AFSCME v. Thompson, 79 C 5196, bars this action under the doctrines of res judicata and collateral estoppel. Although 79 C 5196 was also a civil rights action arising from the July 22 riot at Pontiac, defendants have not established that plaintiffs in this action were parties to or in privity with any of the parties in the prior litigation, Brown v. Felsen, 442 U.S. 127, 131, 99 S.Ct. 2205 (1979); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7, 99 S.Ct. 645 (1979). Moreover, defendants have not established that the broad range of issues raised by the parties in this case are identical to the issues litigated in 79 C 5196. *Parklane Hosiery, supra* at 326 n.6. Accordingly, this Court will not dismiss plaintiffs' complaint on res judicata or collateral estoppel grounds.

Defendants argue as a threshold matter that the Court lacks subject matter jurisdiction over this case because the Illinois Workmen's Compensation Act, Ill.Rev.Stat. 1979 ch. 48, § 138.1 *et seq.*, is the exclusive remedy for all employee claims arising out of deaths or injuries incurred in the course of employment. The state statute upon which defendants rely, however, does not and could not preclude the vindication of plaintiffs' constitutional rights in a federal forum.[2] *See Hutchings* v. *Erie City and County Library Board of Directors,* 516 F.Supp. 1265, 1272-73 (W.D.Pa. 1981). State law cannot immunize the conduct of those persons who, acting under color of law, allegedly deprive others of their constitutional rights. *Cf. Martinez* v. *California,* 444 U.S. 277, 284 n.8, 100 S.Ct. 553 (1980); *McLaughlin* v. *Tilendis,* 398 F.2d 287, 290 (7th Cir. 1968). In light of the wide disparity between the breadth of plaintiffs' damage claims herein and the limited damages award provided in the Illinois Workmen's Compensation Act, Ill.Rev.Stat. 1979 ch. 48, § 138.8(b)(2) and (4.2), the effect of dismissal on this ground would leave plaintiffs without an adequate remedy for the alleged deprivation of their constitutional rights.

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[2] In relevant part, the Illinois Workmen's Compensation Act provides:

> No *common law* or *statutory* right to recover damages from the employer, his insurer, his broker, any service organization retained by the employer, his insurer or his broker to provide safety service, advice or recommendations for the employer or the agents or employees of any of them for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act, to any one wholly or partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury.

Ill.Rev.Stat. 1979 ch. 48, § 138.1(a) (emphasis added). Plaintiffs' suit, although brought pursuant to 42 U.S.C. § 1983, asserts a constitutional rather than common law or statutory right.

The essence of this action is that defendants' failure to control the situation at Pontiac deprived plaintiffs of life and liberty without due process of law as guaranteed by the fourteenth amendment. The question of whether such an allegation of wrongful inaction rises to the constitutional dimension necessary to ground a § 1983 cause of action was addressed by the Supreme Court in *Martinez.*[3]

As made clear in *Martinez,* not every injury resulting directly or indirectly from the conduct of state officials is actionable under § 1983. 444 U.S. at 281. *See also Williams* v. *Kelley,* 624 F.2d 695, 697 (5th Cir. 1980), *cert. denied,* 101 S.Ct. 3009 (1981); *Withers* v. *Levine,* 615 F.2d 158, 162 (4th Cir. 1980). The alleged commission of a state law tort, for example, will gain federal cognizance under § 1983 only when the conduct complained of is particularly egregious. *Williams, supra. See Van Horn* v. *Lukhard,* 392 F.Supp. 384, 387 (E.D.Va. 1975).

However, even if defendants' conduct herein constituted nothing more than mere negligence, this conclusion alone does not mandate the dismissal of this § 1983 action as a matter of law. *See Parratt* v. *Taylor,* ..... U.S. ....., 101 S.Ct. 1908, 1912-13 (1981). Moreover, the causal relationship between defendants' failure to act and plaintiffs' damages, although indirect, is not so remote as to require this Court as a matter of law to grant defendants'

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[3] Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

motions to dismiss.[4] *Cf. Spence* v. *Staras,* 507 F.2d 554, 557 (7th Cir. 1974). The consequence of state officials' failure to act when they had an affirmative duty to do so under state law is sufficient to support a valid § 1983 claim. *Arnold* v. *IBM,* 637 F.2d 1350, 1355-56 (9th Cir. 1981); *Clappier* v. *Flynn,* 605 F.2d 519, 533 (10th Cir. 1979); *Johnson* v. *Duffy,* 588 F.2d 740, 743-44 (9th Cir. 1978); *Sims* v. *Adams,* 537 F.2d 829, 831-32 (5th Cir. 1976).

The critical question of law relevant to these motions to dismiss, therefore, is whether any of the moving defendants had a constitutionally cognizable duty to plaintiffs to take affirmative steps to prevent or control the disturbance at the Pontiac Correctional Center on July 22, 1978.[5] The existence of any affirmative duties owed these plaintiffs can be identified by examining the nature of the

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[4] In Martinez v. California, *supra,* the Supreme Court upheld that trial court's demurrer to the complaint in a § 1983 action on the ground that the murder of a 15 year old girl was "too remote a consequence" of the defendant's decision to release the murderer on parole five months earlier. *Id.* at 285. The circumstances of the present case are substantially different. Particularly in light of the anticipated nature of the disturbance alleged in plaintiffs' complaint, this Court is not prepared to rule, as a matter of law, that the defendants' failure to act in this case is too remote a cause of plaintiffs' damages to support a § 1983 claim for which relief can be granted.

[5] Defendants cite Judge Grady's opinion in Local 494, AFSCME, *supra,* in support of the proposition that the state did not owe plaintiffs any cognizable duty to prevent or control the Pontiac riot. In his opinion, Judge Grady concluded that because the "state has not required [correctional officers] to give up their liberty and remain in the institution, [the state] does not owe them the same protections it owes to prisoners." *Id.* This conclusion, however, does not purport to establish that the state, under all circumstances, owes no cognizable duty to its correctional officers in state prisons.

relationship between the partiss involved. Although the exact nature of the relationship between plaintiffs and defendant O'Sullivan is not made clear in any of the papers filed before the Court, we are not prepared to hold on this record that the assistant warden of the Pontiac facility does not, as a matter of law, owe any affirmative duty to the correctional officers serving that prison. Indeed, at common law, the "special relationship" between an employee and his superiors imposes upon those superiors the duty to protect employees from the reasonably foreseeable attacks of third persons.[6] *See generally Hosein* v. *Checker Taxi Co.,* 95 Ill.App.3d 150, 154, 419 N.E.2d 568 (1st Dist. 1981); *Willie Cross* v. *Chicago Housing Authority,* 74 Ill.App.3d 921, 925, 395 N.E.2d 580

(footnote 5 continued)

At a minimum, the state as employer must provide its correctional officers with reasonably safe working conditions. *Cf.* American Federation of State, County and Municipal Employees v. Walker, 27 Ill.App.3d 883, 888-90, 327 N.E.2d 568 (4th Dist. 1975). *See generally* Coselman v. Schleifer, 97 Ill.App.2d 123, 126-27, 239 N.E.2d 687 (2d Dist. 1968); Mack v. Davis, 76 Ill.App.2d 88, 97, 221 N.E. 2d 121 (2d Dist. 1966); Hendricks v. Socony-Mobil Oil Co., Inc., 45 Ill.App.2d 44, 56-57, 195 N.E.2d 1 (2d Dist. 1963). Defendants' attempt to distinguish the duties imposed on the state in AFSCME v. Walker on the theory that the court was concerned solely with the safety of the residents of the school is unpersuasive. Indeed, in dissent, Judge Simkins observed that the "premise" of the court's ruling was that "the residents *and employees* of the institution have a right to be protected from physical harm." *Id.* at 890 (emphasis added).

[6] The Court is not unmindful of the broad discretion generally afforded prison officials in the administration of prison affairs. U. S. ex rel. Miller v. Twomey, 478 F.2d 701, 721 (7th Cir. 1976), *cert. denied,* 414 U.S. 1146 (1977). By denying defendant O'Sullivan's motion to dismiss, we do not mean to imply that defendants were obligated to take all the affirmative steps outlined in plaintiffs' complaint.

(1st Dist. 1979); *Whalen* v. *Lang*, 71 Ill.App.3d 83, 85, 389 N.E.2d 10 (3d Dist. 1979); Restatement (Second) of Torts, § 302B Comment e(B), 314A Comment A (1965). Whether defendant O'Sullivan satisfied such an obligation or whether his alleged inaction was so egregious under the circumstances that this claim rises to the level of a constitutional deprivation are factual questions which are more appropriately resolved on a motion for summary judgment or at trial.

The relationship between plaintiffs and defendants Shehorn and Lowery, fellow correctional officers at Pontiac, on the other hand, is not sufficient as a matter of law to support a § 1983 claim. Plaintiffs have not identified and this Court will not imply any affirmative duty on these defendants in the absence of the kind of special relationship between the parties required by state tort law. *See Fancill* v. *Q.S.E. Foods, Inc.*, 60 Ill.2d 552, 559-60, 328 N.E.2d 538 (1975); Rstmt. (Second) of Torts, § 314A (1965). A relationship between parties which does not support a tort claim under state law cannot support a § 1983 claim for which relief can be granted. As a practical matter, imposing on those defendants a legal duty to warn all other correctional officers every time a rumor of disturbance arises in the prison would almost certainly result in more confusion than caution.

For the foregoing reasons, the motion by defendants Shehorn and Lowery are granted and the motion by defendant O'Sullivan to be dismissed from this action is denied. It is so ordered.

/s/ M E A
Marvin E. Aspen
United States District Judge

Dated: 1/27/82

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86-218

NO.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

DALE WALKER, ET AL., Petitioners,

v.

CHARLES ROWE
and
DAVID SANDAHL, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF AND BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

DALE WALKER, ET AL., Petitioners,

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CHARLES ROWE
and
DAVID SANDAHL, Respondents.

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Virginia Correctional officers, Sam Bivins, et al., respectfully moves this court for leave to file the accompanying brief in this case as amicus curiae. The consent of the attorney for the petitioners herein has been obtained, but the attorney for the respondents herein refused to consent to the filing of the requested brief amicus curiae.

The movants are nine Virginia correctional officers who are plaintiffs in an analogous action preceding in the

state courts of Virginia, Bivins, et al. v. Sielaff, et al. Movants were on duty in the Virginia State Penitentiary in April, 1985 when a riot broke out and they were repeatedly and severely attacked by rioting inmates. In their action, movants have alleged that responsible prison officals had specific betorehand knowledge of the riot, but took no action whatsoever to protect them. Movants have further alleged that the defendants inaction was a result of their desire to try to hush up the matter and to avoid any publicity on grossly insecure security conditions at the Virginia State Penitentiary.

The movants' civil action was dismissed from the pleadings by the Circuit Court for the City Richmond and is now on appeal to the Supreme Court of Virginia. One of the principal questions involved in the movants' appeal to the Virginia Supreme Court is the identical one that is presented for discussion in the instant case, that is, whether the reckless indifference of prison officials towards the security of their prison staff constitutes a violation of substantive due process. Movants seek permission to file this brief amicus curiae due to the similarities and importance of the two cases. The federal rights implicated

in both cases are identical and the egregious actions alleged by the plaintiffs herein the Virginia case deserve full adjudication.

Movants believe they can provide an argument and analysis which would be useful to the adjudication of this issue by this Court. In particular, movants believe that they can present one area of argument which will not be directly and adequately addressed by the named parties. The principle underpinning of the decision appealed from, by the Seventh Circuit, is the notion that correctional officers are free to leave their jobs and the prison wall, unlike the prisoners confined themselves. The amicus curiae brief sought to be filed by movants presents argument to the contrary which is not expected to be presented by any of the named parties herein.

In addition, the disposition by this Court in the instant case may be entirely depositive of the movants' appeal in the Virginia Supreme Court. The only manner in which movants might be effectively heard on this issue, therefore, would be through their appearance as amicus curiae before this Court in this case.

For the above reasons, movants request permission to file a brief as an amicus curiae.

Respectfully Submitted,

SAM BIVINS, ET AL.

By Dennis W. Dohnal
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CERTIFICATE OF SERVICE

I, Dennis W. Dohnal, one of the attorneys for Sam Bivins, et al.,, amicus curiae herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 14th day of August, 1986, I served copies of the foregoing Motion for Leave to File an Amicus Curiae Brief in Support of the Petition for a Writ of Certiorari thereto, as follows:

1. Neil F. Hartigan, Attorney General
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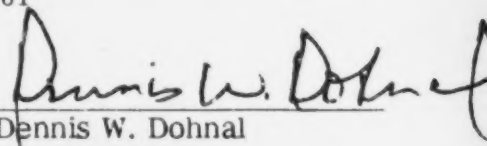

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All parties required to be served have been served.

NO.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

DALE WALKER, ET AL., Petitioners,

v.

CHARLES ROWE
and
DAVID SANDAHL, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE VIRGINIA CORRECTIONAL OFFICERS, SAM BIVINS, ET AL., IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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II

QUESTION PRESENTED

IS THE RECKLESS INDIFFERENCE OF THE PRISON OFFICIALS TOWARDS THE SECURITY OF THE PRISON GUARDS A PROTECTABLE INTEREST UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND 42 U.S.C. §1983?

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INTEREST OF AMICI

The plaintiffs in the Virginia case, Sam Bivins, et al., v. Allayn Sielaff, et al., share common facts and legal issues with the plaintiffs in Walker v. Rowe. The Bivins plaintiffs are guards employed at the Virginia State Penitentiary located in Richmond, Virginia. On April 18, 1985, the Virginia Penitentiary guards were attacked by rioting prisoners under similar circumstances as the plaintiff guard in Walker

were attacked. The Virginia guards suffered aggravated personal injuries because of the gross, wanton, and unconscionable negligence of the prison officials. These facts parallel the facts in Walker v. Rowe.

From a legal perspective, the Virginia guards confront a denial of their due process rights under 42 U.S.C. §1983 and the Constitution just as the Illinois guards in Walker v. Rowe confront. The need to protect this parallel legal concern motivates the Virginia guards to file as amicus curiae.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not officially reported at this time. The unofficial citation is Walker v. Rowe, No. 85-2057 (7th Cir. May 19, 1986). The opinion of the United States District Court for the Northern District of Illinois is not officially reported at this time. The unofficial citation is Walker v. Rowe, No. 80 C 5310 (N.D. Ill. May 20, 1985). The opinion of the United States District Court for the Northern District of Illinois on the respondents' Motion to Dismiss is reported in Walker v. Rowe, 535 F. Supp. 55 (N.D. Ill. 1982).

SUMMARY OF ARGUMENT

This case presents the crucial issue of the extent to which the due process clause of the Fourteenth Amendment

protects prison employees from the gross, wanton, and reckless negligence of prison officials. It is imperative that this protection be one that will deter the excessive and unconscionable actions which caused the malicious wounding of the prison employees.

This Court has recognized the liberty right of citizens to bodily privacy and security. See, Rochin v. California, 342 U.S. 165 (1952); Estelle v. Gamble, 429 U.S. 97 (1976); Ingraham v. Wright, 430 U.S. 651 (1977); Bell v. Wolfish, 441 U.S. 520 (1979); Winston v. Lee, _____ U.S. _____, 105 S. Ct. 1611 (1985). In the given case, the plaintiffs' right to bodily privacy and security should be recognized. The gross, outrageous, wanton, and deliberate negligence of the prison officials against the guards warrant the inclusion of the guards under the umbrella protection of the due process clause's right to bodily privacy.

The distinctions drawn between employment in the prison and employment in the private sector fail to appreciate the actual working conditions in the prison. The guards' lack of freedom of entrance and exit of the prison while at work demonstrates the strict regimentation and quasi-military nature of the guards' profession.

PETITION FOR APPEAL

I. THE ACTIONS AND INACTIONS OF THE PRISON OFFICIALS WERE OF SUCH AN OUTRAGEOUS NATURE THAT THEY WARRANT PROTECTION UNDER THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

The petitioners contend that the respondents, acting under the color of state law, violated the petitioners' right to substantive due process in that their conduct deprived the petitioners of the liberty interests guaranteed by the due process clause of the Constitution of the United States. Substantive due process offers the individual a certain zone of protected privacy into which the governments cannot intrude.

The United States Supreme Court, in accordance with the interpretation of the Fourteenth Amendment, has recognized substantive due process in several areas including: (a) the area of sexual privacy, such as abortion rights, as articulated in Roe v. Wade, 410 U.S. 113 (1973); (b) marriage as articulated in Loving v. Virginia, 388 U.S. 1 (1967); (c) family matters, as articulated in Moore v. East Cleveland, 431 U. S. 494 (1977); and (d) most importantly for

present matters, bodily security as articulated in Rochin v. California, 342 U.S. 165 (1952).

While no provision of the Bill of Rights speaks literally in terms of bodily harm or personal security, this Court has long established a threshold beyond which the due process clause's fundamental guarantee of "liberty" prohibits egregious behavior. This Court first applied substantive due process analysis to intrusions into the sanctity of the body in Rochin v. California, 342 U. S. 165 (1952). In that case, this Court determined that the use of forceable stomach pumping to extract evidence was violative of the Fourteenth Amendment in that it offended the principles of fundamental fairness. Mr. Justice Frankfurter denounced this abuse of authority as follows:

> ...we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamish or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience...this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities.

342 U.S. at 172.

In Rochin, Mr. Justice Frankfurter also formed an infant definition of the individual protections under substantive due process:

> Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked fundamental', or are 'implicit in the concept of ordered liberty.'

342 U. S. at 169 (citations ommitted).

More recent U. S. Supreme Court cases have continued to define and expand the due process protections for bodily privacy. In Ingraham v. Wright, 430 U. S. 651 (1977), the Court determined that the right to bodily privacy protected school students from the **unreasonable** infliction of corporal punishment. In viewing this right as one of "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men", this Court stated that,

> Among the historic liberties so protected was the right to be free from and obtain judicial relief for unjustified intrusion on person security. While the contours of this historic liberty interest in the contexts of our

> federal system of government have not been defined precisely, they have always been thought to encompass freedom from bodily restraint and punishment.

Id., at 673-674.

In Bell v. Wolfish, 441 U.S. 520 (1970), this Court again examined the parameters of substantive due process vis a vis the liberty interests and bodily security for prisoners being held before trial. In this case federal prisoners being held for trial challenged the conditions of their confinement. Due to the fact that the Eighth Amendment applies only to convicted prisoners, this Court proceeded from a substantive due process analysis. Bell, 441 U. S. at 535, note 16. This Court determined that those penal conditions for pre-trial detainees which rose to the level of "punishment" or "unduly punitive" violated due process. Id., at 535. The proper judicial inquiry was into whether a particular bodily intrusion was "imposed for the purpose of punishment or...as an incident of some other legitimate governmental purpose." Id., at 538.

In Hall v. Tawney, 621 F. 2d 607 (4th Cir. 1980), the Fourth Circuit applied this Court's

directives concerning bodily privacy and security to school children. The Fourth Circuit stated:

> The existence of this right to ultimate bodily security--the most fundamental aspect of personal privacy--is unmistakably established in our constitutional decisions as an attribute of the ordered liberty that is the concern of substantive due process. Numerous cases in a variety of contexts recognize it as a last line of defense against those literally outrageous abuses of official power whose very variety make formulation of a more precise standard impossible. Clearly recognized in persons charged with or suspected of crime and in the custody of police officers, we simply do not see how we can fail also to recognize it in public school children under the disciplinary control of public school teachers.

Hall v. Tawney, 621 F. 2d 607, 613 (4th Cir. 1980).

A consistent line of reasoning and analysis emerges from a study of these cases. The citizen enjoys a protection of bodily privacy which must be respected and protected by state authorities. Where legitimate state interests exist, government may intrude upon the individual's right; however, a line is drawn, protected by the Constitution, against intrusions rising to an unprincipled degree. When the facts

in an individual case reveal an intrusion "shocking to the conscience" as in Rochin v. California, supra, "unduly punitive" as in Bell v. Wolfish, supra, or "literally outrageous abuses" as in Hall v. Tawney, supra, then an unconstitutional violation of the right to bodily privacy and security has been laid out.

This Court's concern over unprincipled, outrageous conduct in violation of the right of bodily privacy and security reaches areas analogous to the issues of substantive due process. For example, this Court has established similar protections of bodily privacy under the Fourth and Eighth Amendments. In Estelle v. Gamble, 429 U.S. 97 (1976), this Court held that while mere negligence in medical attention does not normally rise to the level of a constitutional tort because the patient is a state prisoner, constitutional norms are violated when the denial of medical attention is so gross as to rise to the level of "deliberate indifference." This Court drew a distinction between inadvertent lapses in medical judgment, which would constitute at best state torts, and heinous acts rising to those constituting "an unnecessary and wanton infliction of pain" or "repugnant to the conscience of

mankind" which would constitute constitutional violations. Id., at 106-107.

In the Fourth Amendment contexts, a similar line has been drawn by this Court. In Winston v. Lee, _____ U.S._____, 105 S. Ct. 1611 (1985), this Court rejected as unconstitutional under the Fourth Amendment an attempt by the State to forcibly obtain a medical intrusion into a criminal suspect's body to obtain possible evidence. "A compelled surgical intrusion into an individual's body for evidence, however, implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime." Id., at 1616.

Although these examples represent cases decided against the backdrop of constitutional amendments designed to protect more limited plaintiffs,[1/] these examples demonstrate analogous problems. In each case there existed a threshold over which the

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1/ The Fourth Amendment is principally designed to protect criminal suspects while the Eighth Amendment protects convicted criminals. See, Tennessee v. Garner, _____ U.S. _____, 105 S. Ct. 1694 (1985), Ingraham v. Wright, 430 U.S. 651 (1977), Bell v. Wolfish, 441 U.S. 520 (1979).

Constitution would not allow state intrusion. When the facts in a case reveal an intrusion "deliberately indifferent" to the citizens' needs as in Estelle v. Gamble, supra, or an "unreasonable magnitude" as in Winston v. Lee, supra, then an unconstitutional violation of the right to bodily privacy and security has been laid out.

In the instant case the plaintiffs are prison guards. The federal courts have held with virtual unanimity that prison officials are liable for the injuries of the victims of inmate attacks where official inaction rises to the level of gross negligence and deliberate indifference. See e.g., Withers v. Levine, 615 F. 2d 158 (4th Cir. 1980); Stokes v. Delcambre, 710 F. 2d 1120 (5th Cir. 1983); Little v. Walker, 552 F. 2d 193 (7th Cir. 1977); and Martin v. White, 742 F. 2d 469 (8th Cir. 1984). While the exact formulation of the applicable constitutional standard varies somewhat among the various federal circuits, all are consistent in holding that official inattention to the prisoner's personal security, rising to the level of "reckless", "pervasive risk of harm", "deliberate indifference" or "maliciousness" establishes a

constitutional violation. Plaintiffs' allegations here certainly meet this standard.

This Court has certainly not limited substantive due process protections for bodily security to prisoners alone. Rather, this Court has consistently imposed on state officials the duty to protect bodily security in other contexts as well as evidenced by the first part of this discussion. Given this Court's concern with extreme behavior as evidenced in the rulings in Rochin, Ingraham, Estelle, and Winston, and the ruling protecting inmates from gross negligence, the petitioners in this case deserve protection for the gross, wanton, indifferent and unconscionable negligence of the prison officials.

II. THE PRISON SYSTEM DOES NOT PROVIDE THE FREEDOM OF ENTRANCE AND EXIT THAT MOST WORKERS ENJOY, AND IN ACTUALITY PRISON GUARDS HAVE LITTLE IN SIMILARITY WITH EMPLOYEES IN THE PRIVATE SECTOR.

The principle underpinning of the Appeals Court's opinion in this case, holding that prison guards have no constitutional right to bodily protection, is the notion that prison guards voluntarily enter the

prison walls, and therefore any injuries inflicted upon them cannot be constitutionally attributed to correctional administrators. The Seventh Circuit draws an analogy between the circumstances of a prison guard and employment in the private sector. In fact, this assumption by the Seventh Circuit ignores reality. The correctional officers working in our nation's prisons are surrounded by rules and regulations not unlike those restricting movement for the prisoners which they guard.

Correctional officers are organized as a quasi-military police force. The correctional officers are subject to regulations and responsibilities unlike any codes governing private sector employees. First, prison guards have the responsibility of maintaining order among convicted criminals. The nation's prisons constitute an unusually hazardous environment. The maintenance of order and security in this environment, like that in a war zone, requires a high degree of discipline among correctional officers and a para-military structure in the chain of command.

Correctional officers working within the prison must function as a team with each officer being able to rely on his fellow guards to carry out his

related function. If a correctional officer assigned to a given shift fails to appear for his duty, that affects the safety and security of *all other officers.* The absence of one or more officers on a given shift means that some essential security function will remain unattended or that staffing and other areas of the prison are abandoned. Similarly, if a correctional officer decides to leave the prison and abandon his post during the middle of a shift, a similar breach in security will result.

The correctional officer, unlike a civilian employee, is therefore under a heavy responsibility to report before all assigned duties, and to remain at his post throughout his shift. The prison guard situation is unlike a private sector employee and is more analogous to a soldier. A soldier may enlist into the military service but, having done so, he is far from free to choose when he leaves the service or abandons any duty assignment.

Secondly, a correctional officer, like the prisoners he guards, operates within a walled and confined environment where he must seek permission to enter and leave. The gatekeeper of a prison has control over all exit and entry. Once he enters the

prison walls, a correctional officer cannot exit into the free world environment without approval. On any given shift, a correctional officer is as much confined within the prison walls as his charges. Unlike a department store employee who can leave the store during a frantic white sale, a prison guard may not sua sponte leave a prison when he fears for his safety or during a prisoner riot.

For these reasons, a prison guard is largely dependent upon his superiors and fellow correctional officers for his personal security while working within the prison environment. He is in the exact same situation as the prisoner, although for a shorter period, who must depend entirely upon his keepers for personal security. Given the correctional officers' dependence for personal security upon prison officials, they are entitled to protections similar to those enjoyed by prisoners themselves.

CONCLUSION

For the foregoing reasons amici urge this Court to reverse the opinion of the Seventh Circuit.

Respectfully submitted,

SAM BIVINS, ET AL.

By _____
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Dated: August 14, 1986

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PROOF OF SERVICE
CERTIFICATE OF SERIVCE

I, Dennis W. Dohnal, one of the attorneys for Sam Bivins, et al., Amicus Curiae herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of August, 1986, I served copies of the foregoing Amicus Curiae Brief on the parties listed as follows by mail, postage prepaid:

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No. 86-218

Supreme Court, U.S.
FILED
NOV 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

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OCTOBER TERM, 1986

DALE WALKER, et al.,

Petitioners,

v.

CHARLES ROWE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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Printed by Authority of the State of Illinois (P.O. 33435—80—11-7-86)

QUESTIONS PRESENTED

1. Whether the due process clause provides a remedy to a government employee for injuries sustained in the scope of employment which would not be available to a private sector employee?

2. Whether respondents would be entitled to a qualified immunity from liability for civil damages?

3. Whether state post-deprivation remedies, including workers compensation benefits, provide petitioners with an adequate post-deprivation remedy?

LIST OF PARTIES

The Petitioners are: Dale Walker, Sharon Patchett, Danny Dill, The Estate of William Thomas, The Estate of Stanley Cole, and The Estate of Robert Conkle.

The Respondents are: Charles Rowe, then Director of the Illinois Department of Corrections; and David Sandahl, then Assistant Warden of Operations of the Pontiac Correctional Center.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DALE WALKER, et al.,

Petitioners,

v.

CHARLES ROWE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 791 F.2d 507 (7th Cir. 1986). The opinions of the District Court were correctly cited in petitioners' brief. (Petition at 2).

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is properly invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners have correctly quoted the constitutional and statutory provisions involved in this case.

STATEMENT OF THE CASE

Petitioners' statement of the case omits several significant facts. This case was brought by six Illinois Correctional Officers or their estates, who were injured or murdered in the line of duty, by rioting inmates at the Pontiac Correctional Center on July 22, 1978. Each of the six correctional officers voluntarily accepted employment at the Pontiac Correctional Center and were free to terminate their employment at any time. Each of the six correctional officers received training from the Illinois Department of Corrections including riot training. The correctional officers were aware of the risks associated with their chosen profession.

The petitioners each pursued a variety of state remedies including workers' compensation and statutory remedies for disabilities or death in the line of duty. Petitioners also unsuccessfully brought suit against the State of Illinois in the Illinois Court of Claims. After pursuing these remedies, petitioners then brought suit under 42 U.S.C. Section 1983 against the then Director of the Illinois Department of Corrections, Charles Rowe; then Assistant Warden of Operations of the Pontiac Correctional Center, David Sandahl; and other correctional officials who were dismissed prior to or at the trial of this case.

Petitioners claimed that respondents violated their fourteenth amendment due process rights as they failed to provide petitioners with a safe workplace. The jury heard considerable evidence, often disputed by the petitioners, that the Pontiac Correctional Center was a reasonably safe male maximum security prison and that the riot which occurred was neither predicted nor predictable.

ARGUMENT

I.

THE DUE PROCESS CLAUSE DOES NOT PROVIDE A REMEDY TO A GOVERNMENT EMPLOYEE FOR INJURIES SUSTAINED IN THE SCOPE OF THE EMPLOYMENT WHICH WOULD NOT BE AVAILABLE TO A PRIVATE SECTOR EMPLOYEE.

The Seventh Circuit Court of Appeals has held below that the Constitution is not a code of occupational safety, and therefore government employees are not entitled to affirmative protection under the due process clause, from hazards in the workplace. *Walker v. Rowe*, 791 F.2d 507, 508 (7th Cir. 1986). The Seventh Circuit distinguished this case from the line of cases whose roots extend to *Estelle v. Gamble*, 429 U.S. 97 (1976), which hold that where the State takes someone into its care or cuts off private aid, the State must provide replacement protection or services.

The *Walker* Court reasoned that since petitioners voluntarily accepted employment as correctional officers on terms which were presumably acceptable to them, and since petitioners were free to terminate their employment at any time, no affirmative duty existed under the Constitution to provide protection. The decision of the Seventh

Circuit Court of Appeals is clearly correct and should not be reviewed for this reason.

Petitioners erroneously contend that the protections of the due process clause are implicated merely by virtue of their status as government employees. In contrast, a private sector employee, subject to the identical hazards in the workplace, would not be entitled to protection under the due process clause. It is patently obvious that the due process clause was not intended to provide government employees with protections superior to those of private sector employees.

The only feature distinguishing this case from an ordinary tort action brought by an employee against an employer, is the identity of the employer. *McClary v. O'Hare*, 786 F.2d 83, 89 (2nd Cir. 1986). Section 1983 was not intended to be a font of federal tort law to be imposed upon the tort law systems of the States. *Paul v. Davis*, 424 U.S. 693, 701 (1976). This is precisely the result which would be achieved if the Court accepts petitioner's argument.

Should the Court hold that the due process clause protects government employees from hazards in their workplace, it would be creating a Federal Workers' Compensation system in the District Courts for all employees of governmental units. Such a holding would effectively neuter the workers' compensation schemes of the states which provide that an employee's exclusive remedy against an employer for an injury sustained in the scope of employment, is workers' compensation benefits. Cf. *McClary v. O'Hare*, 786 F.2d at 85. Under such a holding, government employees could circumvent the exclusive remedy provisions. Such a holding would also wreak havoc on the dockets of the District Courts and create grave economic concerns for governmental entities.

The exclusive remedy provision of the workers' compensation schemes of the States is a well recognized principle of tort immunity. This Court has upheld the constitutionality of these provisions. *Middleton v. Texas Power & Light Co.*, 249 U.S. 152, 162-3 (1919). "Section 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976).

II.

THERE IS NO EXISTING CONFLICT BETWEEN TWO CIRCUIT COURTS OF APPEALS NOR IS THERE SUBSTANTIAL CONFUSION CONCERNING THE DUTY TO PROVIDE AFFIRMATIVE PROTECTION.

Every Circuit Court of Appeals which has been presented with the issue raised by petitioners in this case has held that the due process clause does not create a duty on the part of a government employer to provide affirmative protection to government employees in the workplace. See: *Walker v. Rowe*, 791 F.2d 507 (7th Cir. 1986); *McClary v. O'Hare*, 786 F.2d 83 (2nd Cir. 1986); and *Hayes v. Vessey*, 777 F.2d 1149 (6th Cir. 1985).[1] No conflict currently exists among any two Circuit Courts of Appeals on this issue. Therefore the Court should not review the decision of the Seventh Circuit Court of Appeals in this case.

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[1] The Sixth Circuit in *Hayes v. Vessey* was presented with the question of whether state post-deprivation remedies satisfied due process. In deciding this question, the *Hayes* Court had to assume the existence of a duty and it held that the state remedies satisfied due process. Therefore the *Hayes* Court did not reach the underlying question addressed by the Seventh Circuit in *Walker v. Rowe*, 791 F.2d at 507.

Petitioners erroneously contend that a conflict exists between the *Walker* decision and a District Court decision from the Western District of Pennsylvania, *P.L.C. v. Housing Authority of County of Warren*, 588 F.Supp. 961 (W.D. Penn. 1984). (Petition at 8). Even if a conflict did in fact exist between the decision of the Seventh Circuit Court of Appeals and a decision of a District Court in the Western District of Pennsylvania, this would not be a sufficient reason to grant the petition.

Further, the *P.L.C.* decision is distinguishable as it is not in conflict with the Seventh Circuit's decision in *Walker*. The Court in *P.L.C.* found that a special relationship existed between the plaintiff and the defendant Housing Authority officials because the plaintiff was assaulted by an agent of the Housing Authority and not by a third party. *Id.* at 588. In *Walker*, the petitioners were not assaulted by agents of the respondents. They were assaulted by inmates "and this makes all the difference." *Walker v. Rowe*, 791 F.2d at 509.

Contrary to petitioners' assertion, the decision of the Seventh Circuit Court of Appeals in *Ellsworth v. City of Racine*, 774 F.2d 186 (7th Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 1638 (1986), does not stand in "marked contrast" with the *Walker* decision. (Petition at 9). In *Ellsworth* the Seventh Circuit held that no special relationship existed between the wife of a police officer and the municipality which employed the officer. *Id.* In dicta to the opinion, the *Ellsworth* Court noted that there *may* be situations where a special relationship might exist by virtue of an employment relationship. *Id.* at 186. However, the *Ellsworth* Court was not presented with this question and did not decide it. This dicta in the *Ellsworth* decision does not create a conflict with the Seventh Circuit's decision in *Walker*. Even if this were construed to

be a conflict, an intra-circuit conflict is not sufficient grounds for the Court to review the *Walker* decision.

Petitioners' contention that the law regarding a governmental entity's duty to provide affirmative protection to citizens from assaults by third parties is in considerable disarray, is without merit. (Petition at 11). Circuit Courts which have been presented with the question have either disposed of the case on the basis of a lack of causation or have held that no duty existed. Circuit Courts which have decided cases on a causation theory have universally relied on the Court's decision in *Martinez v. California*, 445 U.S. 920 (1980), which held that the actions of a parole board in releasing a parolee who murdered the plaintiff were too remote of a consequence to hold the parole board members liable under Section 1983. E.g. *Humann v. Wilson*, 696 F.2d 783 (10th Cir. 1983).

Circuit Courts which have decided cases under a duty analysis, have recognized the general principle that there is no duty to provide affirmative protection in the absence of a special relationship between the parties. See: *Jackson v. Byrne*, 738 F.2d 1443, 1146-9 (7th Cir. 1983); *McClary v. O'Hare*, 786 F.2d 83, 88 (2nd Cir. 1986); *Jones v. Phyfer*, 761 F.2d 643, 645-7 (11th Cir. 1985); *Fox v. Custis*, 712 F.2d 84, 87-90 (4th Cir. 1983); *Estate of Gilmore v. Buckley*, 787 F.2d 714 (1st Cir. 1986). These decisions are rooted in the decision of the Court in *Estelle v. Gamble*, 429 U.S. 97 (1976), which held that the eighth amendment requires the states to exercise some care in affording medical assistance to prisoners. The theory behind these cases is that "when the state takes someone into its care or cuts off sources of private aid, the state must afford replacement protection." *Walker v. Rowe*, 791 F.2d at 511.

In analyzing whether a special relationship exists the Circuit Courts have considered whether the government has taken someone into its care or custody, or has cut off private sources of aid or defense from foreseeable risks. *Id.* While the parameters of what constitutes a special relationship have not been set in stone, the Circuit Courts have consistently followed this analysis.

III.

ALTERNATIVELY, RESPONDENTS ARE ENTITLED TO A QUALIFIED IMMUNITY FROM LIABILITY FOR MONEY DAMAGES.

It is well settled that public officials, such as the respondents in this case, are entitled to a qualified immunity from liability for civil damages if their conduct did not violate any clearly established right of the petitioners. *Mitchell v. Forsyth*, ____ U.S. ____, 105 S.Ct. 2806, 2818-20 (1985). The central question under the qualified immunity analysis is whether petitioners had a clearly established right under the fourteenth amendment due process clause to affirmative protection in the workplace, from the criminal acts of inmates, as of July 22, 1978, the date of the occurrence. *Davis v. Scherer*, ____ U.S. ____, 104 S.Ct. 3012, 3018 (1984).

No Court has held prior to July 22, 1978 that a government employee has a constitutional right to affirmative protection from the criminal acts of third parties in the employee's workplace. Thus the respondents would be entitled to a qualified immunity even if the Court should grant the petition and reverse the Circuit Court's decision.

IV.

ALTERNATIVELY, STATE POST-DEPRIVATION REMEDIES, INCLUDING WORKERS' COMPENSATION BENEFITS, PROVIDE AN ADEQUATE POST-DEPRIVATION REMEDY.

Petitioners have urged the Court to grant the petition to review the issue of whether the state post-deprivation remedies available to petitioners satisfied due process under the Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981). While this issue was raised in the Circuit Court below by the respondents, the Seventh Circuit's decision in *Walker* was not decided on this basis and the Court should not grant the petition to review an issue not decided by the Circuit Court.

However, this issue does provide the Court with another reason for denying the petition as the state post-deprivation remedies which were available to petitioners satisfied due process. *Hayes v. Vessey*, 777 F.2d 1149 (6th Cir. 1985). Thus even if the Court should grant the petition and reverse the decision of the Circuit Court on the question of the existence of a duty, the respondents would still prevail under the theory of adequate state post-deprivation remedies. *Id.*

CONCLUSION

For the aforementioned reasons, respondents pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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